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No. 84-6811

Supreme Court, U.S.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

WARREN McCLESKEY,

Petitioner,

v.

RALPH M. KEMP, Superintendent,
Georgia Diagnostic & Classification Center.

On Writ of Certiorari To The United States
Court Of Appeals For The Eleventh Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The State of Georgia stakes its case largely on two propositions: first that capital cases are so unique that any statistical analysis of capital sentencing patterns is impossible as a

matter of law (Resp. Br. 7-16)¹; and second, that certain methodological flaws in Professor Baldus's analysis of the Georgia data undermine his findings. (Resp. Br. 16-23; 31-36). We deal with these points in Parts I and II respectively. Neither impugns petitioner's strong evidence of racial discrimination, which continues to stand unmet and unrebutted by respondent, as it did during the 1983 federal hearing.²

¹Each reference to the brief for Respondent filed in the Court will be indicated by the abbreviation "Resp. Br.," followed by the number of the page on which the reference may be found. References to the Brief of Amici Curiae State of California, etc., et al., will be indicated by the abbreviation "Cal. Br." and to the Brief Amicus Curiae of the Washington Legal Foundation et al. by the abbreviation "WLF Br."

²We emphasize that petitioner has presented his case on alternative Eighth and Fourteenth Amendment grounds. We do not discuss our Eighth Amendment claim in this brief, since respondent's Eighth Amendment arguments were anticipated and dealt with in our opening brief. (See Pet. Br. 41-44; 97-104.)

I

THERE IS NO "DEATH PENALTY EXCEPTION"
TO THE EQUAL PROTECTION CLAUSE, AND
THE COURT SHOULD FIRMLY DECLINE
RESPONDENT'S INVITATION TO INSULATE
CAPITAL SENTENCING SYSTEMS FROM CLAIMS
OF RACIAL DISCRIMINATION

Respondent first contends that, in a capital case, "[s]tatistical analyses are inadequate as a matter of . . . law." (Resp. Br. 7). While this argument is couched in terms of "statistics," its actual purport is to exclude capital sentencing decisions entirely from the normal procedures and standards for proof of discrimination outlined in Batson v. Kentucky, __U.S.__, 90 L.Ed.2d 69 (1986) and its precursors. Those standards permit a defendant to "make out a prima facie case of purposeful discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose,"

Batson v. Kentucky, 90 L.Ed.2d at 86. Under those standards, statistical evidence may sometimes "'for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds.'" Batson v. Kentucky, 90 L.Ed.2d at 85, quoting Washington v. Davis, 426 U.S. 229, 242 (1976). See also Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 265-66 (1977).

Respondent offers three interrelated reasons why normal principles of Equal Protection jurisprudence should not apply in capital cases: (i) "[e]ach death penalty case is unique," (Resp. Br. 8), involving "too many unique factors relevant to each individual case," to permit any meaningful comparisons (id. at 6); (ii) the "myriad

of factors" that influence capital sentencing decisions makes statistical analysis impossible (id. at 14); and (iii) many of the influential factors in capital cases are so subjective that they can neither be identified nor quantified (id.).

Respondent's first argument echoes the skepticism expressed in McGautha v. California, 402 U.S. 183, 204-07 (1971), that any objective standards can be found or formulated to regulate the choice of sentence in capital cases. Since every case is unique, respondent reasons, there can be no way to compare the dispositions in different cases, and thus there can be no proof that race has played an impermissible role. Yet McGautha's viewpoint has not stood the test of time: as this Court recognized in Gregg v. Georgia, 428 U.S. 153, 193-94 (1976), "the fact is that [capital

sentencing] standards have been developed . . . [and that they] provide guidance to the sentencing authority."³ Respondent elsewhere argues that Georgia's capital system is constitutional precisely because its statutory sentencing standards guide jury discretion among more and less death-worthy cases (see Resp. Br. 23-31; see also, Cal. Br. 18-23; WLF Br. 5-7); he cannot simultaneously maintain that capital cases are so unique that it is impossible to identify meaningful

³Georgia's statute requires appellate review of death sentences to determine whether each is "disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Ga. Code Ann. §27-2537. "If the [Georgia Supreme Court] . . . affirms a death sentence, it is required to include in its decision reference to similar cases that it has taken into consideration. §27-2537(e) (Supp. 1975)." Gregg v. Georgia, 428 U.S. at 167. All of this is, of course, fundamentally inconsistent with respondent's position that every capital case is so unique as to be incomparable with others.

sentencing standards when cases are actually compared.

Respondent's second argument transforms a quantitative distinction into a qualitative one. He suggests that since a capital sentencing decision involves many more considerations than an employment decision, evidentiary tools long held to be appropriate in employment discrimination cases simply have no place in capital cases. (Resp. Br. 8-10; see also Cal. Br. 23-28).

This argument is wrong in law and fact. Governmental decisions in which a large variety of legitimate variables must be considered are subject to proof of discrimination by the usual "sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252,

266 (1977)(rezoning); Keyes v. School District No. 1, 413 U.S. 189 (1973)(school location and zoning). For example, in no area of the law-- including capital sentencing -- has a wider or more subtle array of factors traditionally been deemed legitimate than in the exercise of peremptory challenges to prospective jurors. Yet in Batson the Court specifically held that traditional Equal Protection principles should guide lower courts in determining whether race has affected the prosecutor's decision to strike jurors peremptorily. Batson v. Kentucky, 90 L.Ed.2d at 87-88.

Furthermore, perhaps the greatest virtue of multiple regression analysis is precisely its ability to sort out and determine the influence of one factor, despite the presence of a large number of other factors which may also exert

independent influence. See, e.g.,
Fisher, Multiple Regression in Legal
Proceedings, 80 Colum. L. Rev. 702, 704-
06 (1980); Vuyanich v. Republic Nat'l
Bank, 505 F. Supp. 224, 267-69 (N.D.
Tex. 1980). Multiple regression
techniques have regularly been relied
upon determining medical, scientific,
and agricultural issues many of which,
like capital cases, involve scores of
relevant considerations. As Professors
Baldus and Woodworth testified below,
for example, the statistical methods
employed in petitioner's case were also
central to the National Halothane Study,
through which the national medical
community made its life-or-death
decision on the best anaesthetic for
general medical use. (Fed. Tr. 155-58;
1200-02).

As his third justification for
jettisoning normal Equal Protection

principles, respondent invokes an unnamed and apparently unknowable host of subjective factors that, he surmises, might affect capital decisionmaking. Respondent concludes that petitioner's failure -- indeed, the probable inability of any researcher -- to include all such factors in an empirical study necessarily renders proof of racial discrimination "impossible" in capital cases. (Resp. Br. 14).

Again, the argument is both legally and scientifically unsound. Bazemore v. Friday specifically held that "[w]hile the omission of variables from a regression analysis may render the analysis less probative than it might otherwise be, it can hardly be said, absent some other infirmity, that an analysis which accounts for the major factors 'must be considered unacceptable as evidence of discrimination.'" 92

L.Ed.2d 315, 331 (1986). Accord: Segar v. Smith, 738 F.2d 1249, 1287 (D.C. Cir. 1984); Trout v. Lehman, 702 F.2d 1094, 1101-02 (D.C. Cir. 1983); Detroit Police Officers Ass'n v. Young, 608 F.2d 671, 687 (6th Cir. 1979); Vuyanich v. Republic Nat'l Bank, 505 Supp. at 255-56.

This legal holding accurately reflects the scientific reality. Information on a missing variable does not make a significant difference unless the omitted variable (i) has an influence on death-sentencing which is not "captured by" other variables included in the analysis, and (ii) is itself systematically associated with race. (Fed. Tr.1690-94;1265-73). Thus, omission of a variable such as the "credibility of the witnesses" (Resp. Br. 12) would be important only if such "credibility" was not correlated with

the detailed "strength-of-evidence" variables which Professor Baldus did include in his questionnaire (see S.E. 23-26, questions 61-62D; id. at 29-33),⁴ and if it were plausible to believe that jurors regularly (for non-racial reasons) find witnesses more credible in white-victim rather than black-victim cases. The crucial point is that unidentified factors which are not associated with race will occur randomly in white-victim cases and black-victim cases. They will not produce, and cannot explain away, a systematic pattern of differential capital sentencing between racial groups. Professor Baldus, who controlled for over 230 relevant variables, undoubtedly accounted for the "major sentencing determinants" in the Georgia system. Respondent's expert

⁴Each reference to the Supplemental Exhibits will be indicated by the abbreviation "S.E."

admitted that he had no idea whether any additional variables might make a difference (Fed. Tr. 1569; 1591-92); and the eminent social scientists who have submitted a brief amici curiae in support of petitioner find it "extremely unlikely" that any such factor remains lurking in the shadows. (Brief Amici Curiae for Dr. Franklin M. Fisher, et al., at 22).

* * *

Respondent has, in sum, suggested no valid reason why constitutionally-based standards of proof that are applicable in all other areas of the law should be abandoned when a death-sentenced inmate seeks to prove that "in fact the death penalty [is] . . . being administered for any given class of crime in a discriminatory, standardless, or rare fashion," Gregg v. Georgia, 428 U.S. at

223 (White, J., concurring in the judgment).

II

NONE OF THE PURPORTED DEFICIENCIES IDENTIFIED BY RESPONDENT OR FOUND BY THE DISTRICT COURT IMPEACH THE BASIC SHOWING OF RACIAL DISCRIMINATION
MADE BY PETITIONER

Respondent alternatively invokes findings of the District Court to contend factually: (i) that the "data base" upon which Professor Baldus and his colleagues drew for their information was so deficient -- and their questionnaire and data-collection methods so flawed -- that no valid statistical analyses can be based on their work (Resp. Br. 2; 17-19); (ii) that "multicollinearity" distorts Professor Baldus's research findings (Resp. Br. 2-3; 20-21); (iii) that the State's hypothesis that "white victim

cases are simply more aggravated and less mitigated than black victim cases" (Resp.Br. 6) provides "direct rebuttal evidence to Baldus'theory" (Resp. Br. 4); and (iv) that contrary findings on the race-of-victim issue were reported by Professor Baldus himself (Resp. Br. 4), and, amici contend, by other sources as well. (See Cal. Br. 12 n.5; WLF Br. 18-19 & n.4.)

None of these arguments is correct; the record plainly refutes each one. It is hardly accidental that not a single judge of the Court of Appeals rested his or her opinion, even in the alternative, on the factual findings of the District Court. To the limited extent that those findings were not marred by legal error,⁵ they were clearly erroneous.

⁵The District Court's use of incorrect legal standards precludes reliance upon its findings of fact. For example, the District Court held that "[a]n important limitation

We will examine below a number of the more prominent findings relied upon by respondent.⁶

A. The Reliability of the Data Base

(1) Data Sources -- Respondent contends that the sources of data available to Professor Baldus and his colleagues were "very summary in many

placed on the data base was the fact that the questionnaire could not capture every nuance of every case," (J.A. 136), and that "[m]ultiple regression requires complete correct data to be utilized." (J.A. 144). The District Court also concluded, after an extensive, somewhat confused discussion, entitled "What a Multivariate Regression Can Prove," (J.A. 162), that "multivariate analysis is ill suited to provide the court with circumstantial evidence of the presence of discrimination, and it is incapable of providing the court with measures of qualitative difference in treatment which are necessary to a finding that a prima facie case has been established with statistical evidence." (J.A. 168-69)(italics omitted). All of these holdings are contrary to this Court's subsequent opinion in Bazemore v. Friday, 92 L.Ed.2d at 331.

⁶A more thorough examination of the District Court's findings appears in Appendix E to the Petition for Certiorari. McCleskey v. Kemp, No. 84-6811.

respects.'" (Resp. Br. 18). The Parole Board records, respondent claims, "were brief and the police reports from which the Parole Board summaries were prepared were usually only two or three pages long." Id. The Parole Board files, the District Court found, provided "'no information about what a prosecutor felt about the credibility of any witnesses. R. 1117.'" (Resp. Br. 18).

This characterization of the data sources is incorrect almost from start to finish. Professor Baldus drew his information from an extraordinary range of official Georgia sources on each case, including the full trial transcripts, all appellate briefs, the files of the Georgia Department of Offender Rehabilitation, the files of the Georgia Bureau of Vital Statistics, and the files of the Parole Board. (See S.E. 43, DB 39). L.G. Ware testified

that the parole officials like himself who compile each of its files (all college graduates) prepare a special report: "We check local criminal records, we go to the clerk of [1331] court, get sentence information, indictments, jail time affidavits, we get police reports from the agency that handled the case." (J.A. 52). In homicide cases "if we didn't think the report had all the information we thought we needed, we may interview the officers that were involved in the case . . . [or] the district attorney." (J.A. 54). A Parole Board Manual guides officials at every step:

[The report] should be obtained in narrative form. It should be taken from the indictment, the district attorney's office, the arresting officers, witnesses and the victim. A word picture telling what happened, when, why, where, how and to whom should be prepared. . . . Parole officers should be as thorough as possible when conducting post-sentences on persons who

have received life sentences or sentences in excess of fifteen years.

(J.A. 56-57). Although the District Court faulted the Parole Board files for lacking photostatic copies of the actual police reports in 75% of the cases (J.A. 137), Officer Ware testified without contradiction that nothing "contained in the police reports . . . would [be] routinely omit[ted]" from the Parole Board files. (J.A. 53). These files, in fact, were often superior to the written police reports since they contained the results of direct interviews with police officers and prosecutors about each case. (J.A. 54).

(ii) Questionnaire Design --

Respondent also faults Professor Baldus's questionnaire design, alleging that there are "problems with the format of critical items on the questionnaires, such that there was an insufficient way

to account for all factors in a given case." (Resp. Br. 17). Respondent quotes the District Court that "'[a]n important limitation placed on the data base was the fact that the questionnaire could not capture every nuance of every case.'" (See J.A. 136). Once again, these findings and contentions are themselves riddled with error. Professor Baldus developed three questionnaires, two for his first study, the Procedural Reform Study ("PRS") and one for the Charging and Sentencing Study. ("CSS"). Any restrictions on data entry under the "foil entry" method criticized by respondent were largely limited, as respondent's expert conceded (Fed. Tr. 1392), to the two PRS questionnaires. (Fed. Tr. 274). Professor Baldus testified that the "foil entry" format was virtually abandoned in the CSS questionnaire. (Fed. Tr. 1098-1101).

Since CSS data were used to conduct virtually all of the major analyses relied upon during the federal hearing, (Fed. Tr. 1437), respondent's criticism is essentially irrelevant.⁷

The District Court's complaint that the Baldus studies "could not capture every nuance of every case" not only reflects a legally erroneous standard of proof but a straightforward misunderstanding of the record. Professor Baldus testified that because no questionnaire could be devised to

⁷Nevertheless, as a check on the impact of the use of the foil method, Baldus identified some 50 PRS cases in which there had been "overflow information that wouldn't fit into the original foils." He created new foils to handle the overflow information and reran each of the analyses. The race effects became "somewhat intensified when this additional information was included." (Fed. Tr. 1099-1100). Baldus also recoded and reran analyses involving the only two CSS items retaining the foil method of entry that contained overflow information. His CSS findings remained identical. (Fed. Tr. 1101).

anticipate every possible factor, he constructed a special "narrative summary" section precisely so that coders could "capture every nuance of each case." (Fed. Tr. 239; see S.E. 36).⁸

⁸The brief of amici Washington Legal Foundation et al. displays a similar misunderstanding of Professor Baldus's powerful data collection instrument. Amici assert that one gruesome Utah murder they describe "would have been listed by the coders as a shooting." (WLF Br. at 24, citing the District Court, see J.A. 136-37). Amici are mistaken. Both the PRS and the CSS questionnaires contain numerous entries through which the special features of this case could have been coded. For example, the CSS questionnaire provides: (i) three entry foils, plus an "other" blank space, to code the method of killing (see S.E. 14); (ii) an entry to reflect a contemporaneous rape (S.E. 7, Q. 29); (iii) 34 separate options (including torture, mental torture, unnecessary pain, victim bound or gagged) in a section on special aggravating features of the offense (S.E. 15, Q. 47 A & B); as well as (iv) extensive entries for the respective roles of co-perpetrators. (S.E. 16-18, Q. 47-48). Finally, the "Narrative Summary" section instructs the coder to include "all facts" and "any special circumstances that are not covered in the preceding questions." (S.E. 36).

(iii) Purported Coding Errors --

Respondent faults the Baldus data because of ostensible "'errors in coding the questionnaire'" (Resp. Br. 2), which it says are reflected in "numerous inconsistencies between the coding for the Procedural Reform Study and the Charging and Sentencing Study." (Resp. Br. 18). The District Court, noting these "mismatches" between the PRS and the CSS questionnaires, concluded that coding errors pervaded the study. (J.A. 137-39).

Respondent's challenge to the accuracy of the data entries, however,

In sum, the charge that "the collective horrors of [the Utah case] . . . cannot be reduced to neatly coded variables," (WLF Br. 24), is wide of the mark. Professor Baldus's questionnaires would have captured all relevant factors in the Utah case, including one factor amici have misstated -- the substantially different involvement of the two Utah defendants. See State v. Andrews, 574 F.2d 709 (Utah 1977).

did not entail any actual comparison of Baldus's questionnaires with the underlying files from which the data were drawn. Instead, respondent's expert simply ran a computer check on items from cases that were included in both the PRS and CSS studies. The expert admitted that he made no attempt to compare the coding "protocols" from the PRS and CSS studies, to see whether the ostensibly "mismatched" items had been coded according to different instructions. (Fed. Tr. 1447).⁹

⁹ All CSS coders were law students who were carefully selected (Fed. Tr. 301-03) and extensively trained. (Fed. Tr. 309-11). Coding decisions were guided by a comprehensive written "protocol" developed by Professor Baldus (see DB 43) which contained hundreds of instructions on general coding issues and on rules for coding specific items. (Fed. Tr. 310-11). During the data collection period, a coding supervisor reviewed a large proportion of all completed questionnaires on a daily basis. (Fed. Tr. 401-03). Entries were ultimately checked by computer for internal inconsistencies. (Fed. Tr. 595-99).

In fact, Professor Baldus testified that the instructions often varied significantly. For example, the PRS coders were required to draw inferences, if reasonable, from the file data; in the CSS study, coders were instructed not to draw inferences if information was not present in the file. (Fed. Tr. 367). Respondent was eventually forced to concede, "I don't believe [our expert] is indicating either one is necessarily right or wrong in his judgment. He's just indicating he's done a computer count and found these inconsistencies." (Fed. Tr. 1444).

Professor Baldus, however, did conduct a broad reanalysis of the alleged mismatches, and reported that approximately one percent were attributable to data entry, coding, or key punch error:

[T]hat translates into an error rate of approximately one-half

of one percent in each of the two studies. However, we found on further examination that . . . the error rate in the Procedural Reform Study was higher than it was in the Charging and Sentencing Study.

(Fed. Tr. 1719-20). Since the findings presented to the District Court came largely from the CSS study, the relevant error rate was very low.

(iv) Purported Mistreatment of "Unknowns" -- Respondent poses one final data collection issue -- the number of items that were coded "unknown" in the studies, and Professor Baldus's treatment of those unknowns in his analyses. (Resp. Br.19). Throughout the CSS study, Professor Baldus's coders were instructed to enter a "1" if a fact were "expressly stated in the file", a "2" if the fact was "suggested by the file but not specifically indicated," a blank if the fact were not present in the case, and a "U" if the coder could

not classify the item based on the file. (Fed. Tr. 444-45). Once statistical analysis began, the "U" was recoded as "not present."

In his testimony, Professor Baldus examined one aggravating variable -- that the "victim pled for his life"-- to clarify the logic behind this standard coding procedure. If there had been witnesses present during the crime, he explained, a coder would code the variable either present or absent, depending on the witnesses' accounts. But in the absence of witnesses or other evidence, Baldus reasoned that one could draw no inference either way, and the item would be coded "U." (Fed. Tr. 1685-86; see also id. 1155-58).

This explanation casts in a radically different light the District Court's ominous-looking list of variables coded "U" in more than ten

percent of the cases. (J.A. 139-41). Many involve either state-of-mind or relational variables that are often unknown to any outside investigator. For example, "Defendant's Motive was Sex" would be important if known to a prosecutor or jury. If the fact could be neither eliminated nor confirmed from the evidence, however, Baldus's rule would be to code it "unknown" and ultimately discount its impact either way by treating it as non-existent.

The District Court challenged the basic logic of this coding treatment: "the decision to treat the 'U' factors as not being present in a given case seems highly questionable . . . it would seem that the more rational decision would be to treat the 'U' factors as being present." (J.A. 139). Yet neither petitioner's experts (Fed. Tr. 1684-90) (Baldus); Fed. Tr. 1761-63 (Berk)), nor

respondent's experts (Fed. Tr. 1502-04; (Katz); Fed. Tr. 1656-58 (Burford)) suggested that a "U" should be coded as "1" or "present" for purposes of analysis. Indeed, Dr. Berk, petitioner's rebuttal expert, testified that the National Academy of Science expressly considered this issue during its two-year study of sentencing research and endorsed the very approach Baldus adopted. (Fed. Tr. 1761-63). The District Court's conclusion that a contrary code should have been used is entirely baseless.¹⁰

¹⁰Moreover, Baldus testified that he conducted a series of alternative analyses to test the District Court's assumptions. (See generally Fed. Hab. Tr. 1693-1705 and S.E. 64-66). He recoded unknowns as "1" or "present" just as the Court had recommended. The effects on racial disparities "were within a percentage point of one another and all the coefficients that were statistically significant in the one analysis were in the other." (Fed. Tr. 1701). Another alternative analysis, employing "list-wise deletion" of all cases with "U" codes -- a procedure

B. The Effect of Multicollinearity

Both respondent (Resp. Br. 2; 20-21) and the District Court (J.A. 150-53), decry "[m]ajor problems" presented by the phenomenon of "multicollinearity," which, they assert, invariably "distort[s] the regression coefficients in an analysis." (Resp. Br. 20).

Their concern is misguided. Professor Gross, in his thorough examination of the district and circuit court opinions in this case, has directly addressed the point:

Multicollinearity occurs, in the court's view, whenever 'there is any degree of interrelationship among the variables,' and it distorts the regression coefficients. . . This is false. There is nothing in the assumptions of multiple regression

recommended by the State's principal expert, (Fed. Tr. 1501-02) -- also had no adverse effect upon Baldus' original findings. (Fed. Tr. 1695-96; see S.E. 64). Indeed it increased the race-of-victim coefficient by two percentage points.

analysis that requires uncorrelated regressors; indeed, multiple regression analysis is primarily useful in analyzing data in which there are correlations among the predictor variables."

Gross, Race and Death: The Judicial Evaluation of Evidence of Discrimination in Capital Sentencing, 18 U.C. Davis L. Rev. 1275, 1292 n.83 (1985). The social scientists who appear in this Court as amici strongly concur in this judgment. (Brief Amici Curiae for Dr. Franklin M. Fisher, et al., 25-26). See also Fisher, Multiple Regression in Legal Proceedings, 80 Colum. L. Rev. at 713. Moreover, the issue is not one on which the record is silent. Petitioner's experts testified without contradiction that the effects of multicollinearity, far from increasing the Baldus findings of racial influences in the Georgia system, would, if anything, tend to

dampen their appearance by decreasing their reported statistical significance. (Fed. Tr. 1281-82; 1782). Since Professor Baldus found racial disparities that were highly statistically significant despite any multicollinearity, the entire issue is a spurious concern.

C. The "Direct Rebuttal Evidence"

Apart from his attacks on Professor Baldus's data sources, discussed above, respondent offered virtually no rebuttal evidence to undermine either the stark racial disparities found or their significance. His reference to "direct rebuttal evidence . . . that contradicted any prima facie case of system-wide discrimination, if one had been established" (Resp. Br. 4) is misleading. This reference is to an hypothesis, put forward by his expert at the federal hearing, that Georgia's

racial disparities might be explained by the fact that white-victim cases are, on the whole, more aggravated than black-victim cases, and thus that they receive deservedly harsher penal treatment. (Resp. Br. 6; see J.A. 169-70).

Respondent's hypothesis, like any other, might easily have been tested by determining whether white- and black-victim cases at the same levels of aggravation are, in fact, similarly treated. (Fed. Tr. 1664). Although respondent's expert admitted on cross-examination that such critical testing "would be desirable" (Fed. Tr. 1613), he chose not to undertake it. Instead, respondent rested his case on untested assumptions of precisely the sort condemned by the Court as inadequate in Bazemore v. Friday, 92 L.Ed.2d at 333 n.14. See, e.g., Trout v. Lehman, 702 F.2d at 1102.

Petitioner, however, did not permit these assumptions to go unexamined. Instead, his experts addressed this hypothesis directly (Fed. Tr. 1297; 1729-32; 1759-61), tested it thoroughly (Fed. Tr. 1291-96; see GW 5, 6, 7, 8; see also DB92), and conclusively proved that racial disparities in Georgia are not the result of any differences in average aggravation levels between white- and black-victim cases. (Fed. Tr. 1732). One powerful indicator of this finding appears in the Supplemental Exhibits at page 72. The different bands for white- and black-victim cases reveal that as aggravation levels rise, a substantial gap in the death-sentencing rate opens between cases at the same level of aggravation. Nothing in respondent's hypothesis addresses, much

less refutes, this central truth.¹¹

D. The Suggestion of Contrary Findings

Respondent quotes the Court of Appeals for the proposition that Professor Baldus's first study, the PRS, "revealed no race of defendant effects

¹¹One brief submitted by amici speculates, despite the evidence, that race-of-victim disparities in Georgia surely could not reflect decisionmaker bias, since "the victim is perforce absent from the trial and the victim's race is rarely a matter of relevant concern at trial." (WLF Br. 4). The remark betrays lack of familiarity with the record and with the normal course of capital trials. As a matter of record, Professor Baldus's data demonstrate that much of the reported racial discrimination occurs through the pretrial and presentencing decisions of Georgia prosecutors, who invariably know the race of the victims involved. As a matter of trial practice, moreover, it is the rare Georgia case where the jury is not exposed, during the trial itself, to photographs of the victim, to testimony from the victim's family, or to other clear indicators of the victim's race. In addition, pretrial exposure to newspaper accounts of homicides, as well as local knowledge of the victim among jurors in rural areas and small towns, often gives most jurors knowledge of the victim's race well before trial.

whatsoever and revealed unclear race of victim effects." (Resp. Br. 4, citing J.A. 247). Several amici also suggest that contrary findings on the race-of-victim issue have been reported by other researchers. (See WLF Br. 4; 18-20)(Bureau of Justice Statistics); WLF Br. 18-19 n.4 (Note, 33 Stan. L. Rev. 75 (1980); Cal. Br. 12 n.5 (Kleck, 9 Law & Human Behavior 271 (1985).) None of these assertions is accurate. Every researcher who has ever studied Georgia's post-Furman sentencing patterns has found a significant race-of-victim effect. (See the articles cited in petitioner's principal brief at page 51 n.16.)

The Court of Appeals' adverse remark about the race-of-victim findings in the Procedural Reform Study is unsupported by any citation and is wrong. (J.A. 247). The record reveals that many of

Professor Baldus's PRS analyses did find strong racial effects. For example, DB 98, included in the Supplemental Exhibits at 58, reports highly statistically significant race-of-victim effects, using PRS data, for a wide range of statistical models, including 5-variable, 9-variable, 61-variable, and 164-variable models. Baldus reported and commented upon many other strong race-of-victim effects disclosed by his analysis of the PRS data. (See Fed. Tr. 905-914; 917-919; 939-40; DB95; DB96.)

One amici brief suggests that statistics compiled by the Bureau of Justice Statistics of the United States Department of Justice, which report a higher death-sentencing rate for white defendants than for black defendants, "discredit petitioner's sweeping contention that anti-black discrimination permeates the capital

sentencing process." (WLF Br. 18). In fact, these BJS statistics are consistent with Professor Baldus's own findings. For example, Baldus found that 7 of every 100 white defendants, but only 4 of every 100 black defendants, received a death sentence in Georgia during the 1973-1979 period. (See S.E. 46). Upon further analysis, however, he concluded that the differences are not explained by any "anti-white" bias in Georgia, but rather by the fact that most white defendants in Georgia murder other whites, while most black defendants murder other blacks. (See S.E. 47) The powerful influence of the victim's race in Georgia death-sentencing decisions simply overwhelms the less powerful race-of-defendant effects.

Amici Washington Legal Foundation et al. also mention "other reputable

studies [that] undercut the claims of victim-anchored racial discrimination in capital sentencing." (WLF Br. 18 & n.4). They cite a single work, a student note reporting a limited analysis of data from a four-year period collected in another state. Note, 33 Stan. L. Rev. 75 (1980). Even this study, however, largely replicates Baldus's principal findings. The student found that "black offenders who killed whites were convicted of first degree murder about four times more often than black offenders who killed blacks," id. at 87, and that such defendants received death sentences nearly seven times as often. Id. While the student asserted that "the inference of discrimination collapses" when the analysis is restricted to felony-related murder cases, id. at 88, his data actually reveal the following death-sentencing

rates among all felony-related homicides:

Black kills white 5 of 61 8%

White kills white 4 of 52 8%

Black kills black 1 of 26 4%

White kills black 0 of 3 0%

Id. at 89, Table 4. Although the small number of felony-related murder cases involved precludes a statistically significant finding, the pattern of results supports Professor Baldus's claims.

Other amici refer the Court to Professor Kleck's article for "a recent, objective review of some of these studies and conclusions." (Id.) Professor Kleck's article is indeed instructive; it concludes that while most hypotheses of racial discrimination in the criminal justice system are overstated, prior research does support the following conclusions:

(1) The death penalty has not generally been imposed for murder in a fashion discriminatory toward blacks, except in the South. (emphasis added) . . .

* * *

(5) There appears to be a general pattern of less severe punishments of crimes with black victims than those with white victims, especially in connection with the imposition of the death penalty.

Kleck, Life Support for Ailing Hypotheses: Modes of Summarizing the Evidence for Racial Discrimination in Sentencing, 9 Law & Human Behavior 271, 272 (1985). Professor Kleck thus directly ratifies the principal results reported in this case, and reaffirms Professor Baldus's observation that the "triangulation" of research findings provides one fundamental reason for believing "that there are real race effects operating in the charging and sentencing system in this state." (J.A. 48).

CONCLUSION

The history of the administration of the death penalty in Georgia is a history marred by racial discrimination. Over 81% of all those executed between 1930 and 1970 were black, (see United States Department of Justice, Capital Punishment 1930-1970 at 13), just as 6 out of 7 executed in the post-Furman period -- under Georgia's revised capital statutes-- have been blacks whose victims were white. (Brief for the Congressional Black Caucus, et al., as Amici Curiae, at 5.) Although respondent continues to insist that Georgia's post-Furman system is "functioning as it was intended to function," (Resp. Br. 5), Professor Baldus has amply demonstrated the

existence of strong race-of-victim disparities, as well as race-of-defendant disparities against blacks whose victims are white. This discrimination occurs exactly where it might have been predicted -- among the "midrange" of moderately aggravated cases, where petitioner McCleskey's own case is found.¹²

The Eighth and Fourteenth Amendments surely require no more of petitioner than this evidence, which renders it "more likely than not" that racial

¹²Respondent quarrels with this mid-range analysis -- hypothesizing that "different rankings" could be given to the cases "depending on what variables might be included in a particular regression." (Resp. Br. 22). Yet predictably, respondent has offered no analysis in which Georgia racial results are different. Respondent's expert, who spent over 1000 hours prior to the federal hearing reanalyzing the Baldus data (Fed. Tr. 1576) never uncovered any defensible model or any set of variables that could explain, or even diminish significantly, the role played by race as a determinant in the Georgia capital system.

discrimination has been at work in Georgia's capital sentencing system during the 1973-1979 period. The State's demand for still further proof is certainly not, at this juncture, a legitimate plea for more careful examination. It is instead a heedless request that Georgia be permitted to continue its age-old capital sentencing practices -- despite the facts, despite the law, despite the Constitution.

Amici have contended that it would be "repugnant to any decent sense of law and justice" for a capital inmate to "escape an otherwise valid death sentence by invoking the race of his victim." (WLF Br. 2). That's not what this case is about. The real issue is whether petitioner and other Georgia inmates have received their death sentences in part because of the race of their victims. Decency, law, and

justice are properly invoked to guard against such a possibility, not to condone it.

The Court should reverse the judgment of the Court of Appeals.

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Respectfully submitted,

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